No. 14,562

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation) and YAKUTAT & SOUTHERN RAILWAY (a corporation),

Appellants,

vs.

CITY OF YAKUTAT, ALASKA (a municipal corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

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STATEMENT OF PLEADINGS AND FACTS.

Appellee neither in his Statement of Pleading (Appellee's Bf. 1-3) nor in his Statement of the Case (Appellee's Bf. 4-6), criticizes Appellants' Statement of Pleading and Facts (Main Bf. 2-12), although abstaining practically in the entirety from mentioning Appellants' Pleadings or Evidence.

The word "Appellant" (Appellee's Bf. 4, line 3) is incorrect. It should be "Appellee", who purportedly clarified at different times its application of Appellants' remittance of $1,751.75 on December 7, 1949,

(PR 143-145), i.e.: to exhausting any liability for personal property taxes, penalty, and interest, and partially paying real property taxes (PR 340); applied it to personal property taxes and gave credit for costs (PR 411).

Appellants asserted the bad faith of the assessment and nonequalization as well as the overvaluation and overassessment thereof as early as September 25, 1951, and at no time paid the $1751.75 as a compromise but tendered it as full payment (PR 21-22).

Sec. 16-1-124, ACLA 1949 (Appellants' Main Bf. #13,455, pp. 11-12) specifically provides that bad faith, nonequalization, overvaluation and overassessment are grounds for objection to the assessment, tax, or order of sale.

APPELLEE'S PETITION FOR A REHEARING.

At the outset Appellants submit that Appellee in reality seeks herein to persuade this Honorable Court to reverse its decision of August 18, 1953, in Case No. 13,455, (206 F.2d 612), denying Appellee's prayer in the latter's Petition for Rehearing (p. 8, Case #13,455), namely:

> "We respectfully urge the Court to grant a rehearing of the above matter and that upon a rehearing the court interpose the bar of the ordinance prohibiting the tax-payers, appellants herein, from urging objections which were not urged to the Board of Equalization, and, therefore, to sustain the judgment of the lower court

and failing the foregoing, that this cause be remanded for a segregation of the tax on real and personal property and that an order of sale be allowed as to the real property."

ARGUMENT.

Appellants have read all of the cases cited by Appellee, except one which they were unable to locate. Those cases are too numerous to individually analyze in the limited space of this Reply, but Appellants submit that those of them that are pertinent don't destroy but in principle support Appellants' contention that the Order of Sale of June 29, 1954 (PR 388) is as invalid as the Order of Sale of April 25, 1952 (PR 50).

This Court in *City of Seattle v. Puget Sound Power & Light Co.,* 15 F.2d 794, held that its decision controlled the lower court after the case had been remanded as well as the appellate court on a second appeal unless between the two decisions a change had been made in the law. Here no change in the law had occurred in the interim.

This Court in *Freeman v. Smith,* 62 F.2d 291, held that the decision previously rendered is the law of the case on the second appeal.

In *Rogers v. Hill,* 289 U.S. 582, 592, the U. S. Supreme Court held that a decree of the appellate court from an order of the lower court granting a temporary injunction was not final. An interlocutory

order was involved there. Here, the order of sale of April 25, 1952 (PR 50), was final.

Wells Fargo & Company v. Taylor, 254 U.S. 175-189, is based entirely upon insufficiency of the pleadings, and necessarily upon reversal the lower court in its discretion could allow an amendment to the bill of complaint.

Hodge et al. v. Muscatine County, et al., 196 U.S. 276, involved a cigarette sales tax. It has little if any more pertinency here than for a customer of a merchant in San Francisco or Seattle to urge that he could not be required to pay a sales tax on the merchandise he buys because he has no notice of the imposition of the tax, despite the law or the ordinance that imposes it.

The U. S. Supreme Court in *Messenger v. Anderson,* 225 U.S. 436, held that a prior decision of a Federal circuit court of appeals is not the law of the case for the Supreme Court when reviewing a later decision of the former court in the same case. The logic thereof is plain; otherwise, nothing could be accomplished by taking an appeal if the lower Appellate Court's decision bound the Supreme Court, any more than to take an appeal from the trial court if its decision was the law of the case when heard by this Honorable Court.

In *Chase v. U. S.,* 256 U.S. 1, 9, the Circuit Court of Appeals remanded the case on the first appeal "with instructions to permit the defendant to answer, if so advised". This Court's opinion of July 8,

1953 (206 F.2d 612), and mandate of August 19, 1953, gave no such instruction.

In *Mutual Life Insurance Co. v. Hill,* 193 U.S. 551, 553, the decision on the first appeal was based upon the averments of the pleadings—not upon the merits.

APPELLEE'S FIRST POINT (Bf. 7-19).

Appellee's argument (Bf. 7-19), purportedly replying to Appellants' Fifth Proposition (Appellants' Main Bf. 45-58), entirely ignores that this is a Special Statutory Proceedings as well as Appellants' Second Proposition (Main Bf. 18-26), Appellants' Third Proposition (Main Bf. 27-36), and Appellants' Fourth Proposition (Main Bf. 36-45), and makes no attempt to answer those Propositions or Appellants' argument therein advanced.

Admittedly neither the statutory nor the municipal requirements were complied with in the submission or preparation of Appellee's purported Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370). (See Appellants' Main Bf. 18-26.)

Appellee has not denied Appellants' charge (Main Bf. 37-38), that the document (PR 347), introduced through witness Henry's deposition (PR 345-346) was not new or newly discovered evidence, but was in Appellee's possession at the first trial on January 18, 1952.

Appellants challenge Appellee's version of what constitutes a delinquent tax roll (Appellee's Bf. 17-18), or that the Alaska practice is such as Appellee

asserts. Sec. 16-1-122, ACLA 1949, (Appellants' Main Bf. #13,455, pp. 7-9), specifies how a delinquent tax roll shall be made up, what it shall contain, and how it shall be noticed, and Sec. 16-1-123, ibid, how it shall be presented (Appellants' Main Bf. #13,455, pp. 9-10).

Appellants challenge Appellee's contention that they made no objection to the sufficiency of the application (Appellee's Bf. 18). Appellants specifically urged that no proof of either publishing or posting any notice of application for an order of sale on the purported amended supplemental tax roll had been made, and that no statute authorized its presentation upon an application made more than 3 years previously (PR 381).

The fact is no written application was ever presented except that of January 3, 1951 (PR 1-2), to which Appellants made numerous objections (PR 15-22; 22-23; 26-28).

Neither Sec. 16-1-122 nor 16-1-123, supra, in any wise indicate that the application is a complaint, but both contain specific requirements for the notice of application. No notice of any kind was published, or even posted, of application for order of sale under the purported Amended Supplemental Delinquent Tax Roll (PR 369-370) other than service of a copy of that document upon Appellants the day before it was presented to the Court.

Sec. 16-1-124, ACLA 1949 (Appellee's Bf. 18-19) provides for the protection of a taxpayer's substantial rights.

Appellants submit that their substantial rights were affected by the Appellee's irregularities and failure to comply with the statutory and ordinance requirements (Appellants' Main Bf. 22-26), to which Appellee has made no Reply.

APPELLEE'S SECOND POINT (Bf. 19-22).

Appellants submit that Appellee makes no adequate answer to either the law or the facts stated in Appellants' First Proposition in their Main Bf. (p. 14-18). The date "June 12, 1953", in line 6 from bottom p. 14, thereof, should have been "June 12, 1954"; but, Appellee evidently was not confused thereby.

Appellants submit that the language of their main brief (pp. 14-18) is clear, and not only shows the noncompliance of the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) with statutory and ordinance requirements, but also its service upon Appellants on June 23, 1954, the day before the trial on June 24, 1954, and that Appellants had no time to obtain evidence to meet it, and would have been unable to prove even the nonperformance of the jurisdictional requirements, as stated in their Objections (PR 380-381) in support of their Motion to strike it (PR 379-380), except for Appellee's Admission (PR 350c), other than those shown on the face of the document itself.

APPELLEE'S THIRD POINT (Bf. 22-26).

Appellee admits Appellants' contention (Main Bf. 21, also, 22-26), that no assessment was made for 1949 by the city assessor. Appellee admits (Bf. 23), "This was done by the Board of Equalization simply by copying the work of the previous year of the assessor;" which was jurisdictional. (Appellants' Main Bf. 18-26.)

While Appellants took that same position on the first appeal (Appellants' Main Bf. #13,455, p. 42-44), there was no such admission by Appellee then before either the trial or this Court. See also Appellants' Main Bf. pp. 82-85, #13,455.

Appellee apparently concedes Appellants' contention that this Honorable Court's opinion of July 8, 1953 (206 F.2d 612) is the law of the case, but erroneously applies it to claim that the document (PR 347), which was not new or newly discovered evidence, was thereby made admissible.

APPELLEE'S FOURTH POINT (Bf. 26-28).

Appellants submit that Appellee's Fourth Point does not meet their Third Proposition (Main Bf. 27-37), and that not only the doctrine of exhaustion of administrative remedies does not apply, but that even if it did Appellee waived it by not advancing it at the first trial (Appellants' Main Bf. 35-36). Furthermore, Appellee has admitted the 1949 assessment was not made by the city assessor (Appellee's Bf. p. 23).

Appellee advances the illogical suggestion that, "if the Appellants saw fit to commence to participate in this procedure thus confessing they had adequate notice, but rely solely upon alleged technical objections, they waived their hearings on the merits" (Appellee's Bf. 23). In other words, if Appellants resist the overassessment and overvaluation made in bad faith without equalization, they then are bound no matter that Appellee ignored performance of all statutory and ordinance requirements. If they didn't resist, they, of course, then would be in default. Clearly, Appellee takes the position that Appellants have no rights whatever which they can lawfully seek to protect.

Appellants' objections are not technical. They are statutory. (Sec. 16-1-124, ACLA 1949 (Appellants' Main Bf. #13,455, p. 11) provides that objections may be made on the ground of overassessment, overvaluation, bad faith, and nonequalization.

APPELLEE'S FIFTH POINT (Bf. 28-29).

Appellants submit there is no evidence of the city assessor having made an assessment for the tax year 1949, and that the appellee has admitted that it was done simply by the Board of Equalization copying the work of the previous year of the assessor (Appellee's Bf. 23), and that the document (PR 347) itself clearly shows that no assessment was made by the city assessor (Appellants' Main Bf. 40), and that such facts show bad faith.

APPELLEE'S SIXTH POINT (Bf. 29-30).

Appellants submit that Appellee's Sixth Point neither refutes the law nor the facts stated in Appellants' Sixth Proposition (Main Bf. 59-67).

Wherefore Appellants renew their prayer that the Order of Sale of June 25, 1954 (PR 388-389) may be vacated and set aside and the Appellee's Application dismissed.

Dated, Juneau, Alaska,
April 23, 1955.

Respectfully submitted,
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